CELCOM (MALAYSIA) BHD A

v.

MOHD SHUAIB ISHAK

COURT OF APPEAL, PUTRAJAYA B
TENGKU BAHARUDIN SHAH JCA
ABDULL HAMID EMBONG JCA
HASAN LAH JCA
[CIVIL APPEAL NO: W-02-790-08]
7 JUNE 2010 C

COMPANY LAW: *Derivative action - Suit against directors - Whether leave wrongly granted - Locus standi of respondent as a 'complainant' - Whether judge used wrong basis for granting leave - Must be a direct causal nexus between complaint and how he ceased to be a member - Judge's reference to breach of the Amended and Restated Supplemental Agreement as a nexus, whether wrong - Need for respondent to show that he was acting in good faith - Whether respondent actuated by an ulterior motive - Respondent's allegations of conspiracy baseless and lacking in evidence - Whether judge erred in so readily granting leave* D E

The respondent sought leave pursuant to s. 181A of the Companies Act 1965 ('Act') to commence a derivative action in the name of the appellant against the appellant's directors, Telekom Malaysia Berhad ('TM') and Telekom Enterprise Sdn Bhd ('TESB') and their directors. On 9 July 2008, the High Court granted leave to the respondent. The appellant appealed against this order. The derivative action is intended to recover alleged loss and damages suffered by the appellant for breach of the Amended and Restated Supplemental Agreement dated 4 April 2002 entered into between, amongst others, the appellant and DeTeAsia Holding GmbH ('the ARSA') which contained a buyout provision *ie*, to procure a purchase of DeTeAsia's shares in the appellant at RM7 per share. On 28 October 2002 the appellant entered into an agreement with TM for the acquisition of TM's entire shareholding in TM Cellular Sdn Bhd ('TM Cellular') subject to consideration of issuance of 635,471,698 ordinary Celcom shares to TESB at the price of RM2.65 each to be taken as fully paid up ('the Conditional SPA'). On 7 March 2003, DeTeAsia commenced arbitration proceedings against the appellant to enforce the buyout provision in the ICC F G H I

A International Court of Arbitration ('the Arbitration'). TESB was thereafter legally obliged to offer to purchase Celcom shares from the other shareholders pursuant to s. 34 of the Securities Commission Act 1993 ('SC Act'). TESB then undertook a mandatory general offer ('MGO') acquiring 96.32% of the
B appellant's shareholding thereby triggering a compulsory acquisition of the remaining Celcom shares including the respondent's shares pursuant to s. 34 of the SC Act. On 2 August 2005, an arbitration award ('the Award') was handed down against the appellant for damages. On 17 February 2006, the appellant paid the Award sum
C in full to DeTeAsia while reserving all its rights. The respondent's application was premised on the directors of Celcom: (i) causing Celcom to enter into the Conditional SPA which further caused Celcom to breach the Buy Out Provision in the ARSA, thereby causing loss to Celcom by reason of Celcom's liability under the
D Award; and (ii) causing the MGO to take place at RM2.75 per share rather than at RM7 had TM made an offer for each of DeTeAsia's Celcom shares pursuant to the buyout provision. The respondent had also commenced a personal action in the High Court *vide* D6-22-1568-2007 ('D6 action') which is virtually
E identical to this derivative action and with identical reliefs sought.

Held (allowing the appeal with costs)
Per Abdull Hamid Embong JCA:

F **(1)** The judge was wrong in stating cursorily that the matter before him was "only an application for leave" and relying on the low threshold used under O. 53 Rules of the High Court 1980 to determine if an application for judicial review is not frivolous or vexatious. He must exercise greater caution in satisfying himself
G that the requirements under s. 181A of the Act are met. Merely determining if there existed a *prima facie* case is a wrong basis for granting the leave. *Clear Water Sanctuary Golf Management Bhd v. Ketua Pengarah Perhubungan Perusahaan & Anor* (dist). (para 8)

H **(2)** The judge's reference to the ARSA breach as a nexus is wrong since that breach had no connection to the respondent ceasing to be a member of the appellant. He had misdirected himself. The appellant's entering into the Conditional SPA did not cause the Award and the Award is unrelated to the MGO. It
I was a challenge to the buyout provision that led to the Award

being made, not the entering into the Conditional SPA. The respondent's real complaint was that the MGO took place at the price of RM2.75, by which he had suffered loss. It was wrong for the judge to link the ARSA breach and the compulsory acquisition of the shareholders' shares. (paras 11-14)

(3) In the D6 action, the respondent is suing the appellant for damages whilst in this derivative action he is trying to recover damages on behalf of the appellant. The respondent's stand is not coherent and this raises a suspicion on his true motive in bringing this action. The respondent does not have the appellant's interest at heart but is merely advancing his own interest. Since the respondent was not acting in good faith, the court holds that leave was wrongly granted. Further, the respondent's act is not *bona fide* and is an abuse of process. (paras 21 & 23)

(4) The judge had not fully appreciated that the obligation of the offeror under a MGO is to pay the highest price during a six-month period preceding the offer and RM2.75 was this price from the offer document. There was no reasonable prospect of success to this claim. This court disagrees that there had been a fraudulent or negligent misrepresentation on the part of the proposed defendants in the proposed action. The allegations of conspiracy are also baseless and lacking in evidence, since this was solely based on the fallacious premise that RM7 per appellant share was the minimum value of the MGO. There were no facts pleaded to give rise to a suspicion that TM, combined with the other proposed defendants had caused damage to the appellant. The respondent had failed to raise a reasonable cause of action in either fraud or conspiracy. *Gasing Heights SB v. Aloyah Abd Rahman* (foll). (para 27)

(5) The learned judge here had failed to appreciate that there was no reasonable commercial sense of this proposed derivative action and also failed to seriously take into account the interests of the appellant and its former shareholders when allowing this leave application. The whole unwinding exercise is counter productive to the appellant's interest. The judge had erred in law and had misconceived the facts and circumstances in so readily granting this leave. (paras 29-31)

Bahasa Malaysia *Translation Of Headnotes*

Responden menuntut kebenaran mengikut s. 181A Akta Syarikat 1965 ('Akta') untuk memulakan suatu tindakan terbitan dalam nama perayu terhadap pengarah-pengarah perayu, Telekom Malaysia Berhad ('TM') dan Telekom Enterprise Sdn Bhd ('TESB') dan pengarah-pengarah mereka. Pada 9 Julai 2008, Mahkamah Tinggi memberi kebenaran kepada responden. Perayu merayu terhadap perintah ini. Tindakan terbitan tersebut berniat untuk mendapat kembali kehilangan dan kerugian yang ditanggung oleh perayu disebabkan pelanggaran Perjanjian Tambahan Dipinda dan Dinyatakan Semula bertarikh 4 April 2002 yang dibuat oleh, di antara yang lain, perayu dan DeTeAsia Holdking GmbH ('ARSA') yang mengandungi suatu peruntukan pembelian, iaitu, untuk memperolehi sesuatu belian saham-saham DeTeAsia dalam perayu pada harga RM7 suatu saham. Pada 28 Oktober 2002 perayu membuat suatu perjanjian dengan TM untuk pengambilan keseluruhan pegangan saham TM dalam TM Cellular Sdn Bhd ('TM Cellular') tertakluk kepada balasan pengeluaran 635,471,698 saham-saham biasa Celcom kepada TESB pada harga RM2.65 setiap satu untuk dianggap sebagai telah dibayar sepenuhnya ('SPA Bersyarat'). Pada 7 Mac 2003, DeTeAsia memulakan prosiding timbangtara terhadap perayu untuk menguatkuasakan peruntukan pembelian dalam Mahkamah Antarabangsa Timbangtara ICC ('Timbangtara'). TESB selepas itu diwajibkan di sisi undang-undang untuk membuat tawaran membeli saham-saham Celcom dari pemegang-pemegang saham yang lain mengikut s. 34 Akta Suruhanjaya Sekuriti 1993 ('Akta SS'). TESB kemudian mengusahakan suatu tawaran am mandatori ('MGO') memperolehi 96.32% pegangan saham dan dengan itu mencetuskan suatu pengambilan secara paksa saham-saham Celcom yang masih ada termasuk saham-saham responden mengikut s. 34 Akta SS. Pada 2 Ogos 2005, suatu award timbangtara ('Award') telah dicatatkan terhadap perayu untuk gantirugi. Pada 17 Februari 2006, perayu membayar jumlah Award dengan penuh kepada DeTeAsia sambil mengekalkan kesemua hak-haknya. Permohonan responden berdasarkan pengarah-pengarah Celcom: (i) menyebabkan Celcom membuat SPA Bersyarat yang lagi mengakibatkan pelanggaran Peruntukan Pembelian dalam ARSA, dan dengan itu menyebabkan kerugian kepada Celcom disebabkan liabiliti Celcom di bawah Award; dan (ii) mengakibatkan MGO dilaksanakan pada harga RM2.75

setiap saham dan bukan RM7 jika TM telah membuat tawaran untuk setiap satu saham-saham Celcom DeTeAsia mengikut peruntukan pembelian. Responden juga memulakan suatu tindakan peribadi dalam Mahkamah Tinggi melalui D6-22-1568-2007 ('tindakan D6') yang hampir-hampir sama dengan tindakan terbitan ini dan dengan relief yang sama dituntut.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Abdull Hamid Embong HMR:

(1) Hakim salah apabila menyatakan dengan sepintas lalu bahawa perkara di hadapannya adalah "hanya suatu permohonan untuk mendapat kebenaran" dan bergantung atas ambang rendah yang digunakan di bawah A. 53 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk menentukan jika suatu permohonan untuk semakan kehakiman bukanlah remeh atau menyusahkan. Beliau mesti lebih berhati-hati dalam memuaskan dirinya bahawa keperluan-keperluan di bawah s. 181A Akta dipenuhi. Hanya menentukan jika terdapat suatu kes *prima facie* adalah asas yang salah untuk memberikan kebenaran. *Clear Water Sanctuary Golf Management Bhd v. Ketua Pengarah Perhubungan Perusahaan & Anor* (dibezakan).

(2) Perujukan hakim kepada pelanggaran ARSA sebagai satu nexus adalah salah kerana pelanggaran itu tiada kaitan dengan responden berhenti menjadi ahli perayu. Beliau telah menyalaharahkan dirinya. Tindakan perayu menandatangani SPA Bersyarat tidak menyebabkan Award dan Award tidak berkaitan dengan MGO. Ia adalah cabaran kepada peruntukan pembelian yang membawa kepada pembuatan Award, bukan tindakan menandatangani SPA Bersyarat. Aduan sebenar responden ialah bahawa MGO dilaksanakan pada harga RM2.75, dengan itu mengakibatkan kerugian padanya. Ia adalah salah bagi hakim untuk mengaitkan pelanggaran ARSA dan pengambilan secara paksa kepada saham-saham pemegang-pemegang saham.

(3) Dalam tindakan D6, responden sedang menyaman perayu bagi gantirugi sementara dalam tindakan terbitan ini beliau cuba mendapat balik gantirugi bagi pihak perayu. Pendirian responden tidak koheren dan ini menimbulkan rasa syak mengenai motif sebenar beliau dalam memulakan tindakan ini. Responden tidak mempunyai kepentingan sebenar perayu tetapi

hanya memajukan kepentingannya sendirinya. Oleh kerana responden tidak bertindak dengan suci hati, mahkamah ini memutuskan bahawa kebenaran telah diberikan dengan salah. Lagipun, tindakan responden bukan *bona fide* dan merupakan suatu penyalahgunaan proses.

(4) Hakim tidak menyedari sepenuhnya bahawa kewajipan pembuat tawaran di bawah MGO untuk membayar harga tertinggi pada jangka masa enam bulan sebelum tawaran dan RM2.75 ialah harga ini dari dokumen penawaran. Tidak ada prospek munasabah yang tuntutan ini akan berjaya. Mahkamah tidak bersetuju bahawa terdapat sesuatu salah nyata frod atau cuai atas pihak defendan-defendan yang dicadangkan dalam tindakan yang dicadangkan. Pengataan-pengataan konspirasi juga tidak berasas dan kekurangan keterangan, disebabkan ini hanya berdasarkan premis yang salah bahawa RM7 setiap saham perayu adalah nilai minima MGO. Tiada fakta-fakta yang diplidkan yang menimbulkan rasa syak bahawa TM digabungkan dengan defendan-defendan lain yang dicadangkan telah menyebabkan kerugian kepada perayu. Responden telah gagal menimbulkan suatu kausa tindakan yang munasabah dalam frod ataupun konspirasi. *Gasing Heights SB v. Aloyah Abd Rahman* (diikuti).

(5) Yang arif hakim di sini telah gagal menyedari bahawa tidak ada makna komersial yang munasabah bagi tindakan terbitan yang dicadangkan ini dan juga gagal mempertimbangkan dengan serius kepentingan-kepentingan perayu dan pemegang-pemegang sahamnya terdahulu apabila membenarkan permohonan untuk kebenaran ini. Keseluruhan usaha terurai ini tidak produktif untuk kepentingan perayu. Hakim telah khilaf dalam undang-undang dan telah salah tanggap fakta-fakta dan keadaan-keadaan apabila memberikan kebenaran ini dengan begitu mudah.

Case(s) referred to:

Charlton v. Baber 21 ACIC 1671 ***(refd)***

Clear Water Sanctuary Golf Management Bhd v. Ketua Pengarah Perhubungan Perusahaan & Anor [2007] 10 CLJ 111 HC ***(dist)***

Gasing Heights SB v. Aloyah Abd Rahman [1996] 3 CLJ 695 HC ***(foll)***

Hengwell Development Pte Ltd v. Thiing Chiang Ching & Ors [2002] 4 SLR 902 ***(refd)***

Hunter v. Senate Support Services Ltd & Ars [2005] 1 BCLC 175 ***(refd)***

Johnson v. Gore Wood & Co [2001] 1 All ER 481 ***(refd)***

Ontario Ltd v. Bernstein [2000] OTC Lexis 3480 ***(refd)***
Pang Yong Hock & Anor v. PKS Contracts Services Pte Ltd [2004] SGCA 18 ***(refd)***
Re Winpal Paper Products [2000] 4 SLR ***(refd)***
Swansson v. RA Pratt Properties Pty Ltd & Anor [2002] NSWSC 583 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 181A(4)(b), 181B(4)(a), 181C, 181D, 181E
Malaysian Code on Take-Overs and Mergers 1998, s. 20(1)
Rules of the High Court 1980, O. 53
Securities Commission Act 1993, s. 34

For the appellants - Rabindra Nathan (Nad Segaram & S Bhuvaneswary with him); M/s Shearn Delamore & Co
For the respondents - Lim Kian Leong (Cheah Kit Yee with him); M/s Lim Kian Leong & Co

[Appeal from High Court, Kuala Lumpur; Originating Summons No: D5-24-20-2008]

Reported by Susheila Sreedharan

JUDGMENT

Abdull Hamid Embong JCA:

[1] The facts underlying this application are not disputed and we are grateful to learned counsel of both parties for having briefly simplified them. Suffice that we reproduce the brief facts as found in the appellant's written submission:

a. The respondent filed an application by way of originating summons seeking leave pursuant to s. 181A of the Companies Act 1965 to commence a derivative action in the name of the Appellant against the appellant's directors, Telekom Malaysia Berhad ('TM') and Telekom Enterprise Sdn Bhd ('TESB') and their directors.

b. On 9 July 2008, leave was granted by the High Court Judge for the respondent to commence a derivative action in the name of the appellant along the lines of the proposed statement of claim. This is the order being appealed against.

c. The derivative action in the name of the appellant is intended to recover the alleged loss and damages suffered by the appellant for the breach of the amended and Restated Supplemental Agreement dated 4 April 2002 entered into between amongst others the appellant and DeTeAsia Holding GmbH ("the ARSA")

d. Under the ARSA, the appellant agreed that it would not merge its business to allot/issue new shares without the consent of DeTeAsia.

e. Alternatively, if consent is not given, the appellant would have to fulfill the conditions in Schedule 1 to the ARSA. Under Schedule 1, the appellant would have to procure a third party to buy out the DeTeAsia held shares in the appellant.

f. At the material time, DeTeAsia held 6.05% of shares in the appellant.

g. On 28 October 2002 the appellant entered into an agreement with TM for the acquisition of TM's entire shareholding in TM Cellular Sdn Bhd ('TM Cellular') subject to consideration of issuance of 635,471,698 ordinary Celcom Shares to TESB at the price of RM2.65 each to be taken as fully paid up ("the Conditional SPA").

h. On 7 March 2003, DeTeAsia commenced arbitration proceedings against the appellant in the ICC International Court of Arbitration ("the Arbitration").

i. In the arbitration, DeTeAsia sought to enforce the Buy Out Provision in Schedule 1 to the ARSA by alleging that the appellant entered into the Conditional SPA without the consent of DeTeAsia and without adhering to the buy out at RM7 per Celcom share (ie, the appellant's shares).

j. As a result of the issuance of Celcom shares under the SPA to TESB, TESB was thereafter legally obliged to offer to purchase Celcom Shares from the other shareholders pursuant to s. 34 of the Securities Commission Act 1993 ("SC Act").

k. On 3 April 2003, TESB issued a Notice of Mandatory Offer ("MGO") to the appellant's Board of Directors at RM2.75 per Celcom share which was then followed by a takeover document being dispatched on 23 May 2003.

l. On 17 April 2003, the Conditional SPA was completed and in the circumstances, TESB held 46.35% of equity interest in the appellant. A

m. On 22 April 2003, TESB acquired an additional 55,000,000 Celcom Shares through direct business transaction at the price of RM2.715 each which increased its equity interest in the appellant to 48.45%. B

n. As at 19 June 3003, TESB *vide* the mandatory general offer acquired 96.32% of the appellant's shareholding thereby triggering a compulsory acquisition of the remaining Celcom shares pursuant to s. 34 of the SC Act. C

o. Pursuant to the compulsory buy-out under s. 34 of SC Act, the respondent's Celcom Shares were compulsorily acquired by TESB. D

p. On 2 August 2005, an arbitration award ("the award") was published and handed down by the ICC International Court of Arbitration in the Arbitration against the appellant for damages in the sum of USD177,234,609 together with interest with costs in the sum of USD410,000 and costs of arbitration in the sum of USD820,000 ("award sum"). E

q. The award was only limited to the issue of the enforceability of the Buy Out Provision. There was no finding in respect of the validity or legality of the Conditional SPA and there was no order for specific performance of the Buy Out Provision of the ARSA. F

r. On 17 February 2006, the appellant paid the award sum in full to DeTeAsia while reserving all its rights. Consent Orders entered in England and Singapore *vis-à-vis* satisfaction on the award are found at 4AR p. 569 to 572 and 4AR p. 572 to 573. G

[2] The respondent submitted that the court is fully empowered to grant this leave to initiate a derivative action on behalf of the appellant having satisfied the main criteria required under s. 181A and s. 181B of the Companies Act 1965 (the CA), which are that: H

a. There is a complainant who has the locus to bring the action,

b. The complainant is acting in good faith, (s. 181B CA), I

A c. it is *prima facie* in the best interest of the company that leave be granted to bring this derivative action. Learned counsel for the respondent urged us to give a broad and liberal interpretation to these requirements found under s. 181A and 181B of the CA to favour the respondent, without the need to
B go into the merits of the case at this leave stage, citing *Clear Water Sanctuary Golf Management Bhd v. Ketua Pengarah Perhubungan Perusahaan & Anor* [2007] 10 CLJ 111 and a number of other authorities.

C **[3]** The learned judge in allowing the respondent's application at first instance recognized the two main complaints brought forth by the respondent which may be so summarised, namely:

3.1 Causing the appellant to enter into the conditional SPA and further causing it to breach the provisions of ARSA,
D which resulted in the appellants' liability under the award, and

3.2 By causing the appellant to breach the ARSA provisions, the appellant's directors caused the MGO to take place
E at a lower price of RM2.75 per Celcom share, than if TM had made an offer pegged at RM7 per share.

[4] Learned counsel for the appellant in the opening remarks of his submission criticized the judge for almost totally adopting the
F submission of the respondent as his grounds of judgment. A comparative table of the judgment matching with the parallel passages in the respondent's submission was presented to us to press home the point that the learned judge had completely ignored the submission of the appellant. While we do not approve of the
G method adopted by the learned judge in producing his judgment, we say that this itself cannot be a basis to strike down that judgment, although it was strongly urged by the appellant, that judgment was flawed in not considering the counter arguments of the appellant. These flaws were presented to us as the grounds of this appeal
H which we now consider.

[5] The first ground of appeal relates to the *locus standi* of the respondent as a 'complainant'. Section 181A(4) of the CA states that:

I

(4) For the purposes of sections 181B and 181E, "Complainant" means: A

(b) a former member of a company if the application relates to circumstances in which the member ceased to be a member.

The respondent argued that he was a former shareholder of Celcom holding 500,000 shares until he was required to sell his shares to TESB at RM2.75 per Celcom share under the MGO exercise pursuant to s. 34 SC Act 1993. Learned counsel argued that the corporate exercises which culminated in the compulsory acquisition of the respondent's shares are the circumstances in which the respondent ceased to be a member under s. 181A(4)(b) of the CA. B C

[6] The respondent's application is premised on two complaints, namely:

(i) First, by causing Celcom to enter into the Conditional SPA, the directors of Celcom, *inter alia*, further caused Celcom to breach the Buy Out Provision in the ARSA, thereby causing loss to Celcom by reason of Celcom's liability under award. D

(ii) Second, by causing Celcom to breach the Buy Out Provision in the ARSA, the Celcom directors, *inter alia*, caused the MGO to take place at a lower price than it would have, had TM made an offer for each of DeTeAsia's Celcom shares at RM7 per share pursuant to the Buy Out Provision. It was alleged that Celcom directors, therefore caused loss to the former shareholders of Celcom by causing the MGO to take place at RM2.75 per Celcom share, rather than at RM7 per Celcom share. E F

[7] The learned judge in finding that the respondent had the locus and therefore was a competent complainant gave the following reasons and we quote: G

> The Plaintiff's application relates to circumstances in which Plaintiff ceased to be a member of Celcom. The nexus between the Plaintiff ceasing to be a member or shareholder of Celcom and the circumstances of the proposed claim can easily be seen from the following facts: H
>
> (i) the compulsory purchase of the Plaintiff's shares in Celcom by Telekom Enterprise by way of the MGO under section 34 of the Securities Commission Act, 1993 was only made possible as a direct result of Telekom Enterprise and Telekom I

A acquiring sufficient shares of Celcom under the MGO to enable them to take advantage of the compulsory purchase provisions under section 34 of the Securities Commission Act, 1993;

B (ii) the MGO was itself triggered by the Conditional SPA for the merger of the cellular businesses of Celcom and TM Cellular. The MGO was legally required as a direct result of the Conditional SPA;

C (iii) the Conditional SPA was entered into in direct breach of the Buy Out Provision in the ARSA. The Conditional SPA was entered into without the consent of DeTeAsia and triggered the Buy Out Provision at RM7.00 per Celcom share under the ARSA;

D (iv) the breach of the Buy Out Provision in the ARSA resulted in the Award under the ICC Arbitration which required Celcom to pay US$232,999,745.80 in damages and costs to DeTeAsia;

E (v) the entire process, including the Conditional SPA for the merger of the Cellular businesses of Celcom and TM Cellular and the MGO at the price of RM2.75 per Celcom share appears to have been planned and strategized by the Defendants, especially Telekom and its advisors well in advance of their execution.

F The summary set out above clearly shows how the events complained of by the Plaintiff culminated in the Plaintiff ceasing to be a shareholder through the compulsory purchase of the Plaintiff's shares by way of the MGO under section 34 of the Securities Commission Act 1993.

G **[8]** It should be noted that the respondent had long ago ceased to be a member of the applicant (over six years). The intention of ss. 181A to E of the CA is to enable a member, present or past, to seek leave to bring an action in the name of the company to recover losses sustained by that company. As such, leave to bring a derivative action must not be given lightly (see *Swansson v. R.A. Pratt Properties Pty Ltd & Anor* [2002] NSWSC 583). Thus, once leave is granted the defendants in this case cannot revisit the issue on the grant of leave. Granting leave is therefore final in that sense and not interlocutory in character. In this respect, the learned judge was wrong in stating cursorily that the matter before him was "only an application for leave" and relying on the low threshold used

under O. 53 RHC (application for judicial review) ie, to determine if an application for judicial review is not frivolous or vexations by relying on cases like Clear Water. The learned judge must as a matter of judicial prudence exercise a greater caution in satisfying himself that the requirements under s. 181A of the CA are met. A low threshold of merely determining if there existed a *prime facie* case is therefore a wrong basis for granting the leave. There needs to be a strict interpretation of s. 181A of the CA, and compliance to those statutory requirements. (see *Charlton v. Baber* 21 ACIC 1671).

[9] Section 181A of the CA should thus be restrictively applied. It curtails former members of a company from filing a derivative action under any circumstances. The qualification under sub-section (4)(b) requires proof by the respondent that there must be a direct causal nexus between the complaint and how he ceased to be a member.

[10] In this application the respondent seeks to impugn the decision of the directors of Celcom in entering the Conditional SPA. In such a situation the question of his *locus standi* needs to be fully scrutinized and cannot be casually determined. This has been expressed in the High Court of Australia in *Hunter v. Senate Support Services Ltd. & Ars* [2005] 1 BCLC 175 from this passage:

> This is a convenient point for me to mention that the need for a claimant to have *locus standi* to seek to invalidate a particular decision of a board of directors would appear to be one important reason why there is not and should not be a flood of such claims.
>
> In most circumstances the status of shareholder without more will not give such *locus standi*. Attempts to use derivative actions to circumvent absence of *locus standi* and to pursue claims seeking to impugn decisions of boards of directors will not, where in appropriate, survive the procedural hurdle which they will face immediately after the issue of proceedings, namely the need for the court's permission to continue the same.

[11] The reference by the learned judge to the ARSA breach as a nexus is thus wrong since that alleged breach did not have the consequence of making the respondent to cease as a member of the appellant. The learned judge had therefore misdirected himself in taking the factual nexus between the ARSA breach and the compulsory acquisition of the shares of the Respondent under s. 34 AS, as a circumstance of him ceasing to be a member.

[12] We agree with the appellant's stand that its act of entering into the Conditional SPA did not cause the award. The award *per se* is thus unrelated to the MGO. It was a challenge to the Buy Out Provision (ie, to procure a purchase of DeTeAsia's shares at RM7 per share), that led to the award being made, not the entering into the conditional SPA.

[13] The respondent here is alleging that the MGO took place at the wrong price of RM2.75, by which he had suffered loss. This was therefore his real complaint and concern. It had nothing to do with the circumstances in which he ceased to be a member of the appellant, and not a relevant connection to this application.

[14] With respect, we disagree with the learned judge in his finding that those events had caused the respondent to cease to be a member of the appellant as contemplated under s. 181A(4)(b) of the CA. The alleged breach of ARSA has no connection to the respondent ceasing to be a member. In our considered view, it is therefore wrong for the learned judge to link the ARSA breach and the compulsory acquisition of the shareholders' shares. Any losses that flow from the breach of ARSA had resulted from the award sum having been paid to DeTeAsia.

[15] The second crucial requirement for the determination of the court in granting leave is the need for the respondent to show that he was acting in good faith in making this application. (s. 181B(4)(a)). The onus of proof here is on the respondent on a balance of probabilities. The test of good faith is two-fold. One is an honest belief on the part of the respondent, and two, that this application is not brought up for a collateral purpose. We now reproduce, this part of, the finding of the learned judge on this issue.

> (i) In the present case, *the Plaintiff has proved that there is an arguable case that Celcom has a claim against the proposed Defendants. The Plaintiff cannot be said to be acting in bad faith because he wants Celcom to pursue what he genuinely considers to be a valid claim against the proposed Defendants. The action sought to be instituted is a legitimate and arguable one.*
>
> The Plaintiff may be acting out of self-interest is to maximize the value of his shares in Celcom by pursuing cause of action which he may have against the proposed Defendants. The Plaintiff's self-interest coincides with the interest of Celcom.

This does not mean the Plaintiff is acting in bad faith. Anything that benefits the company (Celcom) will indirectly benefit the shareholders by increasing the share value and it is hard to imagine a situation where a shareholder will not have a self-interest in wanting the company (in this case, Celcom) to prosecute an action which is in its interest to prosecute. (see: *Richardson Greenshields v. Kalmacoff* [1995] 22 OR (3d) 577 (out. CA); *Primex Investment Ltd (supra)*.

(ii) From the facts stated above, *on the face of it, it appears that the main beneficiaries of the wrongdoings have been Telekom, Telekom Enterprise and parties acting in concert as they have succeeded in taking over Celcom at a relatively cheap price and the financial burden of paying compensation to DeTeAsia was passed on the Celcom.*

The Plaintiff is seeking leave to bring the present action on behalf of Celcom to remedy what he claimed to be the unlawful and illegal actions of those who have caused Celcom to commit the acts alleged in the Plaintiff's proposed Statement of Claim. This proposed action is in the interests of Celcom as well as its former shareholders.

This is because *prima facie such acts have caused loss to Celcom and Celcom should have the right to sue the perpetrators. Celcom had to pay compensation to DeTeAsia (when all Celcom had to do was to obtain De-TeAsia's consent to the SPA procure a Buy Out Offer for DeTeAsia at RM7.00 per share, which would not have cost Celcom any money as this would have had to be paid by Telekom since Telekom would have been the purchaser)*.

In addition, *the complaints also show that the shareholders of Celcom suffered losses as the result of the alleged unlawful and illegal actions of the proposed Defendants.* This is because under the MGO, Telekom Enterprise was required to pay the "highest price paid or agreed to be paid" by Telekom and parties acting in concert during the period of 6 months before the Offer period ie, during the period commencing 28.4.2002 until 20.5.2003: (Para 20(1) of the Malaysian Take-Over Code). In order to save Telekom from the burden of making an MGO at a cost of RM 9.34 Billion and also to avoid the need to seek DeTeAsia's consent to the SPA, the proposed Defendants appear to have conspired to cause Celcom to breach its obligations under the ARSA.

A (iii) Therefore, *even though the Plaintiff may benefit commercially if he succeeds in the derivative action, and since the case is a meritorious one and the Court considers that the Plaintiff is an appropriate person (complainant) to bring the action, there seems little reason not to allow the action to be brought.*

B **[16]** This second requirement will depend on the factual circumstance which comes before the court. This was stated by Palmer J in *Swansson* with these words:

> Nevertheless, in my opinion, there are at least two interrelated
> C factors to which the courts will always have regard in determining whether the good faith requirement of s. 237(2)(b) is satisfied. The first is whether the applicant honestly believes that a good cause of action exists and has a reasonable prospect of success. Clearly, whether the applicant honestly holds this belief would not simply be a matter of bald assertion: the applicant may be disbelieved if no
> D reasonable person in the circumstances could hold that belief. The second factor is whether the applicant is seeking to bring the derivative suit for such a collateral purpose as would amount to an abuse of process.

E **[17]** It was submitted for the appellant that the learned judge had completely failed to take these factors into consideration in allowing the application and we agree.

[18] The intended action by the appellant against the intended 21 defendants was based on allegations of breach of duty by the Board
F of Directors which as at October 2002 comprised of:

i. The TM Nominee Directors

ii. The DeTeAsia Nominee Directors

G iii. The Independent Directors

Because of the position that the TM and DeTeAsia Nominee directors being in conflict, a committee of Independent Directors was constituted and they resorted to legal advice on whether the Buy
H Out Provision in ARSA was enforceable, and were advised that there were a number of grounds in the Buy Out Provision that violated Malaysian law amongst which was that the price of Celcom shares at that point was around RM2.31 and that there was no commercial or legal justification why the Buy Out was priced at RM7 per share.
I The Committee of Independent Directors decided to approve the entry of the Conditional SPA without DeTeAsia's consent.

[19] It was submitted by learned counsel of the appellant that based on those background facts the decision of the Independent Directors was an exercise of the prudent business judgment rule by a completely honest and disinterested section of the Board of Directors of the appellant at that material time, which was based on independent legal advice. We agree that the court should thus not interfere and substitute its own judgment in what we hold to be was a proper and prudent business and commercial decision of the directors. *Re Winpal Paper Products* [2000] 4 SLR was cited in support of this proposition by reading this passage:

> On the basis of legal advice and in some of them, for commercial reasons, they decided against pursuing the claims. It has not been shown that their decisions were not honestly made.

[20] It was also pointed out to us that the Intended Statement of Claim, does not show how the Independent directors can be faulted for their decision and that there was no averment that they had conspired with the TM. We agree with the appellant's stand that the learned judge had failed to consider these factors in allowing for the leave, thus ignoring the principle that leave should not be too easily allowed in an application of this nature. We also find that the action does not have any reasonable chance of success, for reasons mentioned later in this judgment.

[21] Next, we address the second limb of the lack of good faith submission that there was a strong basis to find that the respondent was actuated by an ulterior motive in making this application ie,: the collateral purpose argument. It was argued by the appellant's counsel that the learned judge had failed to sufficiently take into account that the respondent had commenced a personal action in the KL High Court *vide* D6-22-1568-2007 (D6 action) which is virtually identical to this derivative action and with identical reliefs sought. The respondent had sued the appellant as one of the defendants in that personal action, based on the same subject matter and same cause of action. Comparing these two actions, there appear to be an inconsistency in that in the D6 action the respondent is suing the appellant for damages whilst in this derivative action he is purportedly trying to recover damages on behalf of the appellant. It would seem to us that the respondent's stand is not coherent and this brings to the fore a suspicion on the true motive on his part in bringing this action. We therefore

A conclude that this action is suspect, and that the respondent does not really have the interest of the company at heart but is merely advancing his own interest. The law does not allow bringing a personal action against the company and then simultaneously to seek leave to bring a concurrent and inconsistent statutory derivative
B action against it on the same causes of action. In such a situation leave should not have been granted. Since it was apparent that the respondent was not acting in good faith, we hold that leave was wrongly granted.

C **[22]** In *Swansson* it was held that the following approaches should be taken:

> Nevertheless, in my opinion, there are at least two interrelated factors to which the courts will always have regard in determining whether the good faith requirement of s. 237(2)(b) is satisfied. The
D first is whether the applicant honestly believes that a good cause of action exists and has a reasonable prospect of success. Clearly, whether the applicant honestly holds such a belief would not simply be a matter of bald assertion: the applicant may be disbelieved if no reasonable person in the circumstances could hold that belief. The
E second factor is whether the applicant is seeking to bring the derivative suit for such a collateral purpose as would amount to an abuse of process.
>
> The applicant may, however, believe that the company has a good cause of action with a reasonable prospect of success but
F nevertheless may be intent on bringing the derivative action, not to prosecute it to a conclusion, but to use it as a means for obtaining some advantage for which the action is not designed or for some collateral advantage beyond what the law offers. If that is shown, the application and the derivative suit itself would be an abuse of
G the court's process: *Williams v. Spautz* [1992] 174 CLR 509 at 526; 107 ALR 635 at 648. The applicant would fail the requirement of s. 237(2)(b).

[23] In the circumstances of the two conflicting actions concurrently taken by the respondent, the learned judge should have
H alerted himself to the question of whether the respondent was acting in good faith. And, on the balance of probabilities, the onus of proof of which now falls on the respondent, we are of a considered and firm view that respondent act is not *bona fide* and found him to have been guilty of an abuse of process.

I

[24] Also, action has been taken by Celcom to recover for an indemnity against some of the appellant's former directors *viz* Tan Sri Dato' Tajuddin Ramli, Dato' Bistamam Ramli and Dato' Lim Kheng Yew for causing the appellant to enter into the ARSA. These legal proceedings are for the recovery of the very loss which the respondent now wishes to claim on behalf of the appellant through this proposed derivative action. It is our finding that where there is a risk of double recovery, as is now apparent, then leave to bring a statutory derivative action like in this case, should not be granted. (See *Hengwell Development Pte. Ltd v. Thiing Chiang Ching & Ors* [2002] 4 SLR 902).

[25] In *Johnson v. Gore Wood & Co* [2001] 1 All ER 481, the House of Lords held that only a company can maintain an action to recover reflective losses and that a shareholder is precluded from doing so. Since the purported loss which the respondent is now claiming for, is a mere reflection of the loss of the appellant, then, in the words of Lord Bingham in *Johnson* "the court must respect the principle of company autonomy, and ensure that the company's creditors are not prejudiced by the action of individual shareholders". Against these principle and policy, it cannot now be argued as the respondent did, that this application for leave for a derivative action is taken up in the interest of the company. (more of this later).

[26] As regards to the limb mentioned in *Swansson* that this proposed derivative action has no reasonable prospect of success, learned counsel of the appellant contended that the learned trial judge had not fully comprehended and appreciated the real situation under the Buy Out Provision when he found that the former Celcom directors had caused loss to the appellant's shareholders by causing the MGO to take place at RM2.75 per Celcom share, rather than at RM7 per share. It was the argument of learned counsel of the appellant, with which we agree, that the learned judge had come to that conclusion based on two fallacies. First, is that if the appellant had complied with the Buy Out Provision and had procured a buyer, that buyer would have been TM; whereas the evidence shows that the appellant obligation was actually to secure a third party offer and not necessarily an offer from TM (see para A(3) schedule 1 of the ARSA). Thus even if there had been due compliance with the Buy Out Provision it would not necessarily be that TM would have assumed the responsibility of buying out DeTeAsia at RM7 for each of its Celcom shares. The buyer could

have been any third party. Also, the highest market share price at the time of the Conditional SPA was then RM2.75, even though the Buy Out Provision had asked the appellant to secure a buyer at RM7 for each DeTeAsia Celcom's share. We agree with the stand of the appellant that it would be wholly unrealistic or unreasonable for TM or any prudent buyer to have purchased those shares at RM7 each instead of the then open market price of RM2.75.

[27] The contention by the respondent that even if the appellant had complied with the Buy Out Provision, then TM would have paid RM7 per share under the MGO is therefore fallacious. The obligation of the offeror under a mandatory takeover scenario is to pay the highest price during a 6-month period preceding the offer. Section 20(1) of the Malaysian Code on Take-Overs and Mergers states:

> 20(1) In the case of a mandatory offer, the offeror in any take-over offer shall offer as consideration that is to be paid or provided for the acceptances of the take-over offer an amount of not less than the highest price (excluding stamp duty and commission) paid or agreed to be paid by the offeror or any person acting in concert with the offeror for any voting shares to which the take-over offer relates within six months prior to the beginning of the offer period.

And this price was RM2.75 as evident from the offer document. We are of the view that the learned judge had not fully appreciated that, against those circumstances, there was no reasonable prospect of success to this claim. For the same reasons, we also disagree with the learned judge that there had been a fraudulent or negligent misrepresentation on the part of the proposed defendants in the proposed action. The allegations of conspiracy on the part of the proposed defendants are in our finding also baseless and lacking in evidence, since this was solely based on the fallacious premise that RM7 per appellant share was the minimum value of the MGO. There were no facts pleaded to even give rise to a suspicion that TM, combined with the other proposed defendants had caused damage to the appellant. In short, the respondent had failed to raise a reasonable cause of action in either fraud or conspiracy. It is trite that for such a serious allegations, specific particulars in relation to the alleged fraud or conspiracy must be pleaded. In *Gasing Heights S.B. v. Aloyah bte. Abd. Rahman* [1996] 3 CLJ 695, this principle was stated clearly in these words:

> The second complaint against these six defendants was that, they had entered into a conspiracy with the fifth defendant to file the motion. *However, apart from the bare assertion of conspiracy based on the joint filing of the action, no particulars of any kind were alleged against these six defendants to show how they were linked to the misdemeanours alleged against the fifth defendant. Just a fraud must be pleaded with great particularity, so also all the constituent ingredients going to make up the conspiracy, must be pleaded. On this ground alone, the claim for conspiracy fails.* (emphasis added)

[28] We need to also mention that this proposed derivative action was filed six years after the event and that it would be obviously against the appellant's interest to pursue it. The test of the interest of the company can be found in the Singapore case of *Pang Yong Hock & Anor v. PKS Contracts Services Pte. Ltd* [2004] SGCA 18, in this passage:

> Having established that an applicant is acting in good faith and that a claim appears genuine, the court must nevertheless weigh all the circumstances and decide whether the claim ought to be pursued. Whether the company stands "to gain substantially in money or in money's worth" (per Choo JC in *Agus Irawan*) relates more to the issue of whether it is in the interests of the company to pursue the claim rather than whether the claim is meritorious or not. A $ 100 claim may be meritorious but it may not be expedient to commence an action for it. *The company may have genuine commercial consideration for not wanting to pursue certain claims. Perhaps it does not want to damage a good, long-term, profitable relationship. It could also be that it does not wish to generate bad publicity for itself because of some important negotiations which are underway.* (emphasis added).

And from Canada, in the case of *Ontario Ltd v. Bernstein* [2000] OTC Lexis 3480) (2000 OTC 758), we quote this passage:

> Justice Brandeis (as quoted by Justice Nemetz in *Re Bellman et.al and Western Approaches Ltd.* [1982] 130 DLR (3d) 193 at p. 202) in *United Copper Securities So. Et.al v. Amalgamated Copper Co. et.al* [1917] 244 US 261 at p. 263-4 stated:
>
> Whether or not a corporation shall seek to enforce in the courts a course of action for damages is, like other business questions, ordinarily a matter of internal management and is left to the discretion of the directors, in the absence of instruction by vote of the stockholders. *Courts interfere seldom to control such discretion intra vires the corporation, except where the directors are guilty of misconduct equivalent to a breach of trust, or where they stand in a dual relation which prevents an unprejudiced exercise of judgment.* (emphasis added)

[29] This application, in effect, seeks to the unwinding of the entire MGO and we agree with appellant's stand that it would now be a laborious, costly and complicated process. It would also have a disastrous effect on the appellant's credibility and market reputation. It would further entail the return of every shares acquired by TM under the MGO back to all shareholders who chose to sell their shares over six years ago, which in turn would cause substantial hardships to all those shareholders especially those who have expended the monies received. Further, there have been changes in shareholders many times over. We agree with the appellant that the learned judge here had failed to appreciate that there was no reasonable commercial sense of this proposed derivative action. His Lordship we feel, had also failed to seriously take into account the interests of the appellant and its former shareholders when allowing this leave application. This issue is of course a mandatory ingredient in considering whether to allow leave, as is expressed in s. 181B(4) which needs repeating:

> (4) In deciding whether or not leave shall be granted, the court shall take into account whether:
>
> (b) it appears *prima facie* to be in the best interest of the company that the application for leave be granted.

To us, *prima facie*, it is apparent that the whole unwinding exercise is counter productive to the appellant's interest.

[30] Leave is a filtering process which in this instance, the court should have used with vigilance. We found that the learned judge had erred in law and had misconceived the facts and circumstances in so readily granting this leave.

[31] For these reasons, this appeal is allowed with costs here and below.